No. 6043.

IN THE

# United States
# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

---

In the Matter of
WONG BING PON
For a Writ of Habeas Corpus.

Wong Bing Pon,
*Appellant,*

*vs.*

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
*Appellee.*

---

## BRIEF OF APPELLEE.

---


SAMUEL W. MCNABB,
*United States Attorney.*
GWYN S. REDWINE,
*Assistant United States Attorney.*
P. V. DAVIS,
*Assistant United States Attorney.*
HARRY B. BLEE,
*Immigration Dept. on Brief.*





Parker, Stone & Baird Co., Law Printers, Los Angeles.

## TOPICAL INDEX.


PAGE

Preliminary Statement ..... 3

Statement of Facts ..... 4

Argument ..... 5

Appellant's First Question ..... 6

Appellant's Second Question ..... 10

Reply to Petitioner's Authorities ..... 12

(A) As to the Opinion of the Board of Special Inquiry ..... 12

(B) As to the Certificate Filed by the Public Health Surgeons ..... 14

Conclusion ..... 16


---

## TABLE OF CASES AND AUTHORITIES CITED.


PAGE

Immigration Act of 1924 (43 Stat. 153), Section 23.... 6

Leong Kim Wai v. Burnett, 23 Fed. (2) 789.....7, 13

Ng Fung Ho v. White, 259 U. S. 246..... 12

Wong Fook Ngoey v. Nagle, 300 Fed. 323..... 15

Wong Nung v. Carr, 30 Fed. (2d) 766..... 12

Woo Hoo v. White (C. C. A. 9th), 243 Fed. 541..... 14

No. 6043.

IN THE

# United States
# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

---

In the Matter of
WONG BING PON
For a Writ of Habeas Corpus.

Wong Bing Pon,
*Appellant,*

*vs.*

Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
*Appellee.*

## BRIEF OF APPELLEE.

---

## PRELIMINARY STATEMENT.

This case is before this court on appeal from an order of the United States District Court in and for the Southern District of California, Central Division, discharging a writ of habeas corpus and remanding Wong Bing Pon, appellant herein, to the custody of appellee for deportation in accordance with a warrant issued by the Secretary of Labor.

The original Department of Labor, Bureau of Immigration record No. 55691/312 has been filed heretofore and, when occasion requires, said record will be referred to as the "Bureau File." Two San Francisco Immigration Service records have been filed and will be referred to as file 25167/3-7 and 27576/12-15. The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record."

## STATEMENT OF FACTS.

Wong Bing Pon, appellant herein, was born in China, and is of the Chinese race. He arrived at San Pedro, California, on the steamship "President McKinley" on June 16, 1929, and applied for admission at that port as a citizen of the United States by virtue of the provisions of section 1993 of the Revised Statutes of the United States, claiming to be the son of Wong Lip Que, the latter being a citizen of this country by birth. Thereafter appellant was examined by the Board of Special Inquiry of the United States Immigration Service at San Pedro and witnesses were called and testified in his behalf. At the conclusion of the examination appellant was excluded from admission to the United States. Thereafter an appeal was filed in accordance with the provisions of the Immigration Law and the complete record of the proceeding held at San Pedro, California, was transmitted to the Secretary of Labor at Washington, D. C. Appellant was represented before the Board of Review of the Department of Labor at Washington, D. C., by Attorney Charles E. Booth of that city. On the 20th day of August, 1929, the Secretary of Labor

caused an order to be issued affirming the excluding decision of the Board of Special Inquiry at San Pedro. Appellee was preparing to deport appellant to China when habeas corpus proceedings were instituted. Thereafter an order was entered on December 13, 1929, discharging the writ and remanding appellant to appellee for deportation.

## ARGUMENT.

The Board of Special Inquiry at San Pedro denied appellant admission to the United States

> "As an alien applicant ineligible to citizenship and not exempted under provisions of paragraph 13 (c) of the Act of 1924, he not having established his claimed relationship; as an applicant under 16 years of age and not accompanied by one or more parents; not in possession of an unexpired immigration visa; and likely to become a public charge."

It was the opinion of the Board of Special Inquiry that appellant had not shown himself to be the son of a citizen of the United States and accordingly denied his admission to this country as an alien. Counsel contends that the following are the questions at issue in this case:

1. Are the alleged discrepancies in the testimony before the Board of Special Inquiry of such a nature that they constitute substantial evidence to support the exclusion of the appellant?

2. Has there been any substantial and proper evidence before the immigration authorities to show that the appellant is not of the age claimed?

The real issue in this case is that of relationship and both of the questions above stated merge into that issue.

The status of Wong Lip Que, alleged father of appellant, as a citizen of the United States is not questioned in this proceeding. Appellant is of Chinese birth and of the Chinese race. He is seeking admission to the United States for the first time. Under the immigration laws he is considered an alien until he establishes that he is a citizen of the United States. Section 23 of the Immigration Act of 1924 (43 Stat. 153) provides in part that:

> "Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion. . . ."

In order to show that he is entitled to admission to the United States it must be shown that appellant is the son of Wong Lip Que. With this fact in mind we will consider:

## Appellant's First Question.

The only way that the Board of Special Inquiry at San Pedro could determine the truth of appellant's statement as to his relationship to Wong Lip Que was to question appellant, his alleged father, and any witnesses who appeared in behalf of appellant, on matters of common knowledge. If the testimony of all parties concerned had been in agreement, the Board of Special Inquiry might have decided that the relationship claim had been sufficiently established to justify admission of appellant as the son of Wong Lip Que. If, on the other hand, testimony on subjects which should be of common knowledge between the interested parties was in disagreement on material matters, the board might have properly concluded that the relationship does not exist.

It will be seen that in cases of this character the possibility of fraudulent claims are numerous. Prior to sailing for the United States prospective fraudulent applicants and their witnesses may be carefully coached on relationship testimony, upon conditions prevailing in the home village of the applicants in China, and on other issues, all in anticipation of the questions that may be propounded by the immigration authorities. When such applicants arrive at a United States port of entry it becomes apparent that the immigration authorities are in a sense handicapped in these investigations, for seldom are they in a position to offer evidence to controvert the claims made by such applicants. While fraud is sometimes detected, of course that does not justify the inference that every such case is fraudulent, but it does compel the immigration authorities to go into the facts in each case in great detail. In discussing the necessity of great care in cases of this character, this Honorable Court in the Hawaiian case of *Leong Kim Wai v. Burnett,* 23 Fed. (2) 789, said in part:

> ". . . of course, the appellant should not be deported because of the numerous frauds thus perpetrated by others; but the circumstances are such that it behooves the court below and now behooves this court to scrutinize the record with the utmost care, to the end that the exclusion and immigration laws may not be set at naught in that territory and elsewhere."

It is necessary, in order to protect the interests of the Government and to prevent the landing as citizens of those who may not be entitled to that status, to ask applicants many detailed questions during the course of their examination. The court will understand, therefore, that

at the hearing accorded this appellant the questions propounded were not frivolous and no attempt was made on the part of the Board of Special Inquiry to develop other than the truth.

As set forth on pages 15 and 16 of the Bureau File, the Board of Special Inquiry at San Pedro pointed out some ten different discrepancies in testimony which led the board to believe that the relationship claim had not been proven. In addition to this the board considered the physical appearance of the appellant, who claimed to be 16 years and 3 months old, whereas, as a matter of fact, the appellant is only four feet six and one-eighth inches tall and has the appearance and manner of a boy between 8 and 10 years of age. These discrepancies and the appearance of the appellant convinced the board that the appellant could not be the son of Wong Lip Que and therefore excluded appellant as an alien. In commenting upon the case, as indicated by its finding and recommendation of August 20, 1929, appearing in the Bureau File, the Board of Review found that some of the discrepancies pointed out by the Board of Special Inquiry at San Pedro were of slight significance. Three features, however, were deemed of such a nature that they seemed inconsistent with the relationship claims.

The *first feature* deals with the question as to when Wong Lip Que, appellant's alleged father, returned from China to the United States. The board asked the appellant this question with reference to his alleged father:

> "Q. When did he come back from China? A. He came back here about two years ago." (See page 9 of the Bureau File.)

Wong Lip Que, in enumerating his trips to China, as indicated on pages 1 and 2 of the Bureau File, testified that he had made three trips to China, returning from his first visit in January or February, 1906. He returned from his second visit in May or June, 1915, and from his third trip in December, 1928, or January, 1929. We cannot assume that the appellant, who according to his testimony was born on March 17, 1913, could have any recollection of his alleged father's return to China in May or June, 1915. We must conclude, therefore, that when the appellant was asked the question above quoted, and to which he replied that his father came back from China about two years ago, the appellant had reference to the last trip from China made by Wong Lip Que. San Francisco file 27576/12-15 contains record of the several trips made by Wong Lip Que to China and that record and the testimony of Wong Lip Que himself indicates that his last return from China was in January, 1929, on the steamship "President Madison." If the appellant is in fact a son of Wong Lip Que, it does not seem reasonable that he would claim that the latter came back to the United States "about two years ago," when the correct date of that return was less than six months previous to the date of the arrival of the appellant at San Pedro. The departure of his father from China, which must be a rather momentous event in a Chinese family such as that in which the appellant claims membership, would have made an impression upon the mind of the appellant had he been in fact a member of Wong Lip Que's household so that the discrepancies on this point should not have occurred. Despite the rather ingenuous explanation offered by counsel as to how this

discrepancy occurred, as set forth on pages 6 and 7 of counsel's brief, appellee believes that this discrepancy is of such nature as to raise a serious question as to the relationship claim advanced.

The *second feature* relied upon by the Board of Review in Washington, as indicating that the relationship claims do not exist, is that appellant is unable to give the names of his paternal grandparents. The testimony relative to this question appears on page 8 of the Bureau File, and because of the fact that ancestral worship is a cardinal principle of the Chinese religion and universally followed in China, the Board of Review in Washington construed the inability of appellant to give the names of his paternal grandparents as an indication that he was not a member of Wong Lip Que's family. While appellee admits that the examination on this point might have been more complete and might have more fully demonstrated the knowledge or lack of knowledge that the appellant had concerning his paternal ancestors, yet it does appear that a 16-year-old boy, if he is that old, should have been able, in view of the Chinese custom, to give the names of his paternal grandparents. Appellee contends that these two important discrepancies justify the conclusion that the appellant is not the son of Wong Lip Que.

## Appellant's Second Question.

Under this question will be discussed the *third feature* relied upon by the Board of Review in Washington as indicating that the relationship claim does not exist. We refer to the age and appearance of the appellant. The latter testified on pages 7 and 15 of his hearing of June 24th and 25th, 1929, as it appears in the Bureau File,

that he was born March 17, 1913. Later both Wong Lip Que and Wong Bing Fuey, alleged brother of the appellant, testified that the latter was born March 6, 1914. San Francisco file 27576/12-15 covering Wong Lip Que's visits to China indicates that he departed for China on March 22, 1913, from San Francisco on the steamship "Shinyo Maru" at such a time as would make the parentage of the appellant impossible if the birth date given by the latter is correct. If we assume that the appellant made a mistake of one year in giving his age to the board at San Pedro and adopt May 6, 1914, as the date of his birth, the appellant, at the time of his hearing at San Pedro, was 15 years, 3 months, and 19 days old American reckoning or 16 years old by Chinese reckoning. The board found appellant to be four feet six and one-eighth inches tall as indicated on page 15 of the Bureau File and commented upon the general appearance, attitude, and demeanor of the appellant, which seemed to indicate that he was a child between the ages of 8 and 10 years. While the members of the Board of Special Inquiry at San Pedro are laymen only and did not base their opinion as to the age of the appellant upon scientific data, yet appellee contends that constant contact with applicants for admission to the United States, and in passing upon the cases of hundreds of such applicants, the opinion of the members of the board at San Pedro as to the *apparent* age of the appellant is entitled to some probative value and that the finding of the Board of Review in Washington that the appellant was less than the age claimed by him was not unfair to the appellant.

Appellee believes that the inability of the appellant to give the names of his paternal grandparents, his inability

to give the approximate date of his alleged father's last return from China, and the question of the age of the appellant were sufficient to challenge the relationship claim advanced and justified the Board of Review's finding that the relationship claim had not been satisfactorily established. In other words, appellee believes that there was ample evidence to justify the action of the Board of Review in sustaining the action of the Board of Special Inquiry at San Pedro. It is well established that the courts will not review the findings of the Secretary of Labor on questions of fact involved if there is some substantial evidence to support it.

*Ng Fung Ho v. White,* 259 U. S. 246;
*Wong Nung v. Carr,* 30 Fed. (2d) 766.

## Reply to Petitioner's Authorities.

Counsel contends that the only basis for the conclusion that the appellant is younger than the age claimed by him is (A) the opinion of the chairman of the Board of Special Inquiry stated on page 15 of the hearing of June 24th and 25th, 1929, as incorporated in the Bureau File; and (B) the certificate of the two public health surgeons who certified that in their opinion the appellant was about 9 years of age.

### (A) As to the Opinion of the Board of Special Inquiry.

While denying that the chairman of the Board of Special Inquiry is qualified to express an opinion as to the age of appellant, counsel contends that if the chairman were qualified it was not proper for him to express his personal opinion as to the appellant's age. To sup-

port this contention counsel refers to the case of *Leong Kim Wai v. Burnett* (C. C. A. 9th), 23 Fed. (2d) 789, wherein this Honorable Court held that:

> "A judge cannot make his individual knowledge of facts without his judicial knowledge the basis of his decision or judgment."

In the cited case the judge apparently permitted his personal knowledge of the facts to influence his decision. The cited case differs materially from the case at bar. In the cited case the judge relied upon his "individual knowledge of facts," while in the case at bar no such knowledge of facts was relied upon by the Board of Special Inquiry. From discrepancies in testimony and from the general appearance, attitude, and demeanor of the appellant, the board was of the opinion that appellant was between the ages of 8 and 10 years.

In connection with this point we refer to the case of *Lew Git Cheung v. Nagle* (C. C. A. 9th), 36 Fed. (2d) 452, cited by counsel on page 17 of his brief. In that case the Chinese appellant and his witnesses testified that he was 20 years and 6 months old. His own medical experts expressed the opinion that appellant was between 19 and 21 years of age and filed elaborate certificates setting forth why and how they had reached that conclusion. The public health surgeon certified that in his opinion Lew Git Cheung was within 3 years either way of the age of 27 years. The Board of Special Inquiry members estimated appellant's age at from 23 to 25 years. In affirming the order quashing the writ and remanding Lew Git Cheung for deportation this Honorable Court expressed a doubt as to the wisdom of following the practice generally used in presenting opinions in the form

of certificates where there was no opportunity afforded for cross-examination. In the cited case, however, the certificates, although conflicting, were considered competent evidence. The court said in part:

> "we see no escape from the view that if such testimony is competent at all—and both sides concede competency—the record exhibits a substantial conflict; and aided by their own impressions, based upon appellant's appearance, the administrative officers cannot be said to have acted arbitrarily and unreasonably in the conclusion they reached."

It will thus be seen that upon this question of age, where there is a substantial conflict in the evidence presented by experts, this Honorable Court recognizes the right of the administrative officers to determine the age of the alien before them "aided by their own impressions based upon appellant's appearance." If the right of administrative officers to pass upon the age of an alien is thus recognized in cases where so-called expert testimony as to the age is at variance, appellee believes the court should recognize the right of administrative officers to form an opinion and to pass upon the question of age when no expert testimony as to the alien's age is presented. This leads us to a consideration of the probative value of the certificate filed by the public health surgeons in the instant case.

(B) As to the Certificate Filed by the Public Health Surgeons.

In *Woo Hoo v. White* (C. C. A. 9th), 243 Fed. 541, this Honorable Court held in effect that where a certificate of two surgeons had been filed relative to the age of Woo Hoo and where it was not represented that the

certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant, the opinion of the surgeons, as expressed in the certificate, was of no greater value than that of laymen. In view of this decision appellee concedes that the certificate filed with reference to appellant herein is of no more value than the expression of an opinion by laymen. In *Wong Fook Ngoey v. Nagle,* 300 Fed. 323, this Honorable Court considered as evidence the doctor's certificate filed in view of the fact that the certificate indicated what facts the public health surgeons had considered in arriving at their decision as to the age of the person involved. In *Lew Git Cheung v. Nagle, supra,* this court expressed a doubt as to the wisdom of accepting these opinion certificates for the reason that no opportunity for cross-examining the certifying physicians had been offered, the court apparently being of the opinion that such cross-examination might be necessary in order to determine whether or not the certificates were entitled to *any* weight. Measured by the standard set forth in the *Wong Fook Ngoey v. Nagle case, supra,* it will be seen that the certificates filed as exhibits by the doctors in behalf of appellant fall far short of the legal requirements. The certificates filed by Doctors Anthony and Emery seem to be based chiefly upon the condition of appellant's teeth. As to the certificate filed by Dr. G. Lew Chee, it seems to meet none of the requirements established in the Wong Fook Ngoey case. In view of the almost complete lack of scientific data in these certificates, appellee contends that they are of little probative value in determining the age of appellant, and are little better than the expression of the opinion of laymen. They are, therefore, of no

greater value than the certificate filed by the public health surgeons at San Pedro. Not having before it competent expert testimony on the age of appellant (for the medical certificates filed in behalf of appellant never were presented to the Board of Special Inquiry at San Pedro, California, for consideration), the board at San Pedro was justified in fixing the age of appellant "aided by their own impressions based upon appellant's appearance."

For the above reasons appellee respectfully contends that the finding of the Board of Special Inquiry that appellant was a "child between the ages of 8 and 10 years" should not be disturbed.

On page 11 and on pages 19 to 22 of his brief, a number of cases are cited by counsel which hold in effect that hearings accorded appellant for admission to the United States must be fair hearings and there must be some evidence to justify the finding of the Board of Special Inquiry before exclusion orders may be sustained by the courts. We have no fault to find with these cases. Appellee recognizes the right of every applicant to a fair and impartial hearing when he seeks to enter the United States. Appellee contends, however, that no set rule can be laid down for deciding these cases but that each case must be decided upon its own merits. Appellee believes that in the case at bar a fair hearing was accorded the appellant.

## Conclusion.

Appellee believes that the relationship between appellant and Wong Lip Que has not been satisfactorily established and that this appeal should be dismissed and that appel-

lant should be remanded to appellee for return to China, his native country.

Respectfully submitted,

SAMUEL W. MCNABB,
*United States Attorney.*
GWYN S. REDWINE,
*Assistant United States Attorney.*
P. V. DAVIS,
*Assistant United States Attorney.*
HARRY B. BLEE,
*Immigration Dept. on Brief.*